APPEAL NO. 022702
FILED DECEMBER 16, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on September 30, 2002. The hearing officer determined that while the evidence pointed to a specific injury having occurred on _____, this was not an issue in the case; she further held that the respondent/cross-appellant (claimant) was not injured in the course and scope of his employment on that date or through repetitive trauma and the cause of his back problems could not be determined from the evidence. However, she found that the appellant/cross-respondent (carrier) failed to timely dispute the compensability of the alleged _____, injury within either seven or sixty days of the date written notice of injury was stipulated. The hearing officer also found that there was timely reporting of the injury and that the claimant had disability, beginning on May 8 through June 6, 2002.

The carrier appeals. It argues that the hearing officer erred in not admitting a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) form because it had not been timely exchanged. The carrier asserts that the determination that it waived the right to dispute compensability is erroneous because the excluded TWCC-21 shows that it disputed timely.

The claimant responds that the hearing officer's action was correct. The claimant appeals the determination that he did not have a "compensable" injury, or that such injury was limited to a strain/sprain. The claimant further asserts that there is no basis in the evidence for ending disability on June 6, 2002.

DECISION

Affirmed in part, reversed and rendered in part.

The claimant asserted that he was required to repetitively pull large maps from file drawers maintained by his employer, bending, stooping, and lifting. He identified _____, as the date a stooping and lifting incident was the "straw that broke the camel's back". However, the sole issue reported from the benefit review conference (BRC) was whether he sustained a repetitive trauma injury. The hearing officer declined to expand the issue to include a specific injury.

The carrier tendered a TWCC-21 form which had not been exchanged prior to the date of the CCH. It is date-stamped by the Texas Workers Compensation Commission central office on May 24, 2002. The parties stipulated that the date that written notice of injury was received by the carrier was May 20, 2002. However, the TWCC-21 form shows the date of the asserted injury as October 15, 2001, and the date of receipt of written notice of that injury as February 20, 2002. An adjuster who testified that he was <u>not</u> the adjuster on the claim in May 2002 speculated that the February 20,

2002, date was a typographical error, but there is no explanation in the record for the October 15, 2001, date of injury shown thereon. He further speculated that the TWCC-21 would have been "faxed" to the carrier's Austin representative for filing.

The nature of the injury reported by the claimant to his employer was a back strain, muscles spasms, and leg numbness. The claimant's treating doctor diagnosed thoracic and lumbar injuries described in terms of nerve root irritation and radiculitis and generalized symptoms. Medical reports show that the treating doctor kept the claimant off work at least through August 22, 2002. The claimant briefly returned to work under a light duty release on May 6, 2002, but said that the employer was unable to accommodate him and therefore his last day of work was May 7, 2002. He said he was still in pain and had numbness down one leg.

REFUSAL TO ADMIT THE OFFERED MAY 24, 2002, TWCC-21

While we would generally agree with the carrier's argument that a properly stamped TWCC-21 should be admitted into evidence or officially noticed regardless of whether it was exchanged, we can affirm the hearing officer's action in this case because the TWCC-21 that was tendered is not clearly one relating to the claim at hand. We are unwilling to require a hearing officer to speculate that various typographical errors have been made in order to conclude that a tendered TWCC-21, with a date of injury months previous to that asserted at a BRC and CCH, and a first written notice date a month prior to the stipulated date, was "really" one filed to dispute compensability of the injury at hand. This is especially true when the witness for the carrier attempting to authenticate the TWCC-21 was not involved with the adjustment of the claim or actual filing of the TWCC-21 at the time, and there are no official notes in evidence by the person who received written notice of an injury and acted thereon. We cannot agree that there was error in excluding the TWCC-21

WAIVER OF THE RIGHT TO DISPUTE COMPENSABILITY

In the absence of any TWCC-21 accepting payment for or disputing an _____, date of injury, particularly within the first seven days, the hearing officer's determination that the carrier waived the right to dispute compensability is hereby affirmed.

WHETHER THERE WAS A "COMPENSABLE" INJURY

The claimant has correctly pointed out an obvious error in a conclusion of law. Although the hearing officer found a waiver of the right to dispute the compensable injury, she also concluded that the claimant did not sustain a compensable injury in the form of an occupational disease. However, we have held that the effect of a waiver under Section 409.021 is to render the alleged injury compensable as a matter of law. Therefore, we reverse Conclusion of Law No. 5 and render it to read:

The claimant sustained a compensable injury in the form of an occupational disease.

NATURE OF THE INJURY

We do not agree that a reported issue over extent of injury must be brought forward in order for a hearing officer to issue some statement as to the nature of the injury as shown by the medical records. On the other hand, the hearing officer may not, as a lay person, issue an independent diagnosis not set forth in those records.

The finding of fact that the medical records "show" that the claimant sustained a "strain/sprain" to his lumbar and thoracic spine represents more a conclusion from the description of symptoms in this case rather than any diagnosis set forth by the treating doctor. While we do not agree that the nature of the injury was limited by this finding of fact, future dispute has been arguably injected into the future course of the claim. Consequently, we therefore reform this finding of fact to indicate that the claimant sustained "an injury" to his lumbar and thoracic spine; as the hearing officer noted, there has not yet been objective testing, perhaps due to the dispute by the carrier, and there are other diagnoses recorded in the medical records (radiculitis, myofacitis, nerve root irritation) that may not necessarily be limited to a strain/sprain.

PERIOD OF DISABILITY

The hearing officer erred in two ways by holding that the claimant had six weeks of disability. First of all, this appears predicated on the hearing officer's *sua sponte* conclusion that the claimant only had a strain/sprain. Second, there is no support in the record for ending disability six weeks after the date of injury; the treating doctor's records do not support this and there are no medical opinions or contrary evidence that the claimant became able, on June 6, 2002, to obtain and retain employment equivalent to his preinjury average weekly wage.

While we do not disagree that a hearing officer can evaluate medical records and testimony and determine that at some point the effects of the injury no longer resulted in an inability to work, there still must be some identifiable point supported by the evidence that supports this analysis and an end to disability prior to the point that suggested by all medical records in evidence. Here, it appears from the discussion that the hearing officer has arbitrarily picked a six-week point in time as the date the claimant should have been able to return to full-time employment. There is not even a peer review report in evidence speculating how long the effects of the apparent injury should have lasted that would support this supposition. Because the hearing officer plainly believed the treating doctor and the claimant at least through June 6, 2002, and did not wholly reject such testimony altogether, as she could have done, there needs to be some evidentiary support for making this date significant.

In the absence of any such evidence, this finding is against the great weight and preponderance of the evidence. There is no supportable basis for concluding that the

treating doctor's notes became less credible after June 6, 2002, or that the claimant's testimony about continuing pain provided less of a basis for the inability to work after June 6, 2002; therefore, we reverse, and render the decision that the claimant had disability from May 8, 2002, to the date of the CCH. The carrier is ordered to pay benefits in accordance with this decision.

The true corporate name of the insurance carrier is **AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Judy L. S. Barnes
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge